

# First Amendment Protections for Employees Involved in the Adult Industry

– The Marcie Betts Case

By: Lawrence G. Walters

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Imagine showing up for your day job one Friday afternoon and being summoned by your boss for a “chat.” When you arrive at his or her office, you are handed a stack of pictures of you downloaded from the adult Website that nobody was supposed to know about. Your employer then hands you a pink slip, and tells you to immediately clean out your desk. Welcome to the world of workplace discrimination – but this kind of discrimination is usually not against the law.

This scenario is becoming more and more common these days; and most employees are out of luck because of the “Employment at Will” doctrine. That legal principle essentially allows employers to terminate workers for any reason, or no reason whatsoever. However, one fired employee, by the name of Marcie Betts, stood up and fought back, and recently won the right to job reinstatement; on First Amendment grounds. This is her story:

Marcie Betts was a prison guard, or “corrections officer” as they now prefer to be called. She worked at Roxbury Correctional Institution in Hagerstown, Maryland, and was an exemplary probationary employee. Before she was hired, she sold some nude pictures of herself to an adult Website called [BurningAngel.com](http://BurningAngel.com). During the interview process with the Division of Corrections, she was never asked whether she had been involved in adult entertainment or nude modeling, although an extensive background investigation was conducted and plenty of

opportunity existed for such inquiry. She was hired in November, 2003, and after some training time, reported for work the middle of January, 2003. She immediately received positive feedback from her superiors and co-workers about her job performance. However, it was not long before rumors of her involvement with the adult Website began to surface, to her surprise and dismay. After initially attempting to shrug off the rumors, the Warden ultimately confronted her with evidence of her participation in the Website. An investigation was launched, during which it was uncovered that an inmate almost obtained a magazine containing an image of Ms. Betts. As it turns out, this inmate had a subscription to a magazine entitled *Tabu Tattoo*, wherein a single image of Marcie Betts appeared. Inmates at Roxbury Correctional Institute are allowed to receive sexually explicit materials; however, this magazine was intercepted before the inmate ever received it, because it contained a picture of a corrections officer, which made it contraband. Importantly, inmates there are not permitted to access the Internet at this particular institution. Therefore, there was no indication that any inmate ever actually accessed or viewed any erotic image of Marcie Betts -- either online or in any other medium.

Nonetheless, Ms. Betts was terminated on January 29, 2003, as a result of her pre-employment nude modeling and involvement with the Website. Although she was not represented by counsel at that point, the firing certainly seemed unfair, and possibly unconstitutional, at least to her. In upholding the firing during the initial administrative review process, a hearing officer determined that "some" of the images justifying the termination were not protected by the First Amendment. Parenthetically, none of the subject images were ever declared to be obscene by any court or jury, and therefore this finding defied logic. At that point, Ms. Betts retained the author as lead counsel, and Jon Katz, Esq., as local counsel, to defend her interests and seek reinstatement as a corrections officer with the Division of Corrections. She

also set up a legal defense fund website, [www.FightForOurRights.com](http://www.FightForOurRights.com), to inform the public about this significant battle. Importantly, as a public employee, she enjoyed a Fifth Amendment property right in her employment, unlike most private sector employees. Also, given the reasons asserted for the termination, substantial Free Speech interests were at stake as well.

Terminated employees are entitled to a full-blown adversarial hearing on the legality of their termination, under Maryland administrative law. Such a hearing was immediately requested, and in response, on September 22 through 23, 2003, an Administrative Hearing was conducted before Administrative Law Judge D. Harrison Pratt to determine whether involvement in an adult Website constituted legal justification for terminating a public employee. The Division of Corrections pulled out all the stops in its attempt to justify this termination, even going so far as to hire a surprise expert witness, the former Director of the Virginia Department of Corrections, which generally is not cheap. Although this expert was not disclosed until a few days before the hearing, he was allowed to testify as to all the “parade of horrors” that would occur if Ms. Betts were allowed to function as a Corrections Officer after having appeared nude on an adult Website. The essence of the Department’s position was that once a female appeared in erotic photography, and the inmate population learned about it, that female was forever transformed into nothing more than a sex object who would thereafter be subject to immediate sexual abuse by the inmate, who could not control themselves upon learning of such information. Such concerns were dismissed as “speculative” by the Judge, who on November 12, 2003, determined that the termination violated Marcie Betts’ First Amendment rights to freedom of speech, and that those rights outweighed any safety concerns identified by the Division. The Judge also did not overlook the fact that even though these images had been in global circulation for several months before she was fired, no inmate had ever come into possession of a single

image of Marcie Betts. She is therefore now entitled to reinstatement with full pay and benefits, along with compensation for attorney's fees incurred in seeking her job back. An online copy of the decision can be found [here](#).

Those employees working for private employers may not be so lucky if their involvement in the adult entertainment field is uncovered and used as a basis for termination. The First Amendment's guarantee of freedom of speech only prohibits governmental censorship and retaliation, and is not applicable to private employers. While other legal theories might be used to challenge a discharge based on involvement in adult media in the private sector, such as breach of contract, gender discrimination or retaliatory discharge, these claims are much more difficult to pursue, particularly in the absence of a written employment contract. Only a couple of states and cities have enacted legislation protecting employees from adverse employment action based on leisure time or off duty conduct. However, as the role of the employer becomes more and more controlling in the average citizen's daily life, such legislation is likely to catch on. Large employers have become something akin to quasi-governments given their power over our daily lives and ability to control our behavior. The role of the employer is often much more influential than the role of the government, in one's daily routine. Accordingly, federal legislation is necessary to protect the privacy interests of workers nationwide, to prevent the employer from taking the place of Big Brother in 2004. For now, at least one adult Internet model's First Amendment rights have been vindicated; something all too rare in modern times.

*Lawrence G. Walters, Esq., is a partner in the national law firm of Weston Garrou & DeWitt, with offices in Orlando, Los Angeles, and San Diego. Mr. Walters represents clients involved in all aspects of adult media. Nothing in this article constitutes legal advice. Please contact your personal attorney with specific legal questions. Mr. Walters can be reached at [Larry@LawrenceWalters.com](mailto:Larry@LawrenceWalters.com), through his website: [www.FirstAmendment.com](http://www.FirstAmendment.com) or via AOL Screen Name: "Webattorney."*